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Supreme Court of the United States

October Term, 1946.

No. 890.

SMITH, RICHEY & CO., INC., *et al.*,
Petitioners,

AGAINST

PHILIP B. FLEMING, Temporary Controls Administrator,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

PETITIONERS' REPLY BRIEF.

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SMITH, RICHEY & CO., INC., *et al.*,
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PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Emergency Court of Appeals.

PETITIONERS' REPLY BRIEF.

Respondent in his brief states the question presented in such a form as to avoid the real issue and makes certain statements of fact in a manner which is or may be misleading.

I.

Respondent Begs the Question.

Respondent states that the question presented is (Br. 2):

> "Whether the United States Emergency Court of Appeals erred in dismissing petitioners' complaint

> brought under Section 204 (a) of the Emergency Price Control Act, with leave to petitioners to move to reinstate the complaint in the event that any proceeding should be brought against them under Section 205 of the Act based upon any provisions of the orders and regulations objected to in the complaint, *when the regulations and orders were no longer in effect and there was no case or controversy as to their past validity existing between the parties to the proceeding.*" (Emphasis ours.)

The latter part of respondent's statement of the issue obviously begs the question. As thus phrased, the question assumes as a fact or settled law that as a result of the decontrol of meat the protested regulations are "no longer in effect" and that there is "no case or controversy between the parties hereto as to their past validity."

The first of these assumed "facts" is contrary to the decisions of this Court and to the Price Administrator's own orders cited in the petition and record[1] and the latter of these assumed "facts" is either likewise contradicted or has not as yet been and remains to be settled by this Court.

Moreover, both of these assumed "facts" are wholly refuted by the very judgment of the Emergency Court which respondent seeks to have sustained, for the very fact that the said court found it necessary to grant leave to petitioners to reinstate the complaint in the event of future enforcement proceedings against them and to retain jurisdiction for such purpose, even if only with respect to future enforcement proceedings under Section 205 of the Act (50 U. S. C. App., Sec. 925), unmistakeably shows an implied holding on the part of said court that

1. *U. S.* v. *Hark*, 320 U. S. 531; *Collins et al.* v. *Porter*, 328 U. S. 46; *Thomas Paper Stock Co.* v. *Porter*, 328 U. S. 50; *Utah Junk Co.* v. *Porter*, 328 U. S. 39; Supplementary Order 40, as amended, 11 F. R. 14,103; Supplementary Order 186, 11 F. R. 12,178 (R. 4, 31)

the protested regulations are "still in effect"; that the rights of petitioners need to be protected and must be preserved; that there is a "case or controversy between the parties to the proceeding" as to the past validity of said regulations; and that the court has jurisdiction of the cause and is empowered to retain same.

It is respectfully submitted, therefore, that the issue before this Court is not as stated in respondent's presentation of the question, but as stated by petitioners (Pet. 4-6) and whether the Emergency Court erred in the respects stated in the petition (Pet. 9-10).

II.

Correction of Respondent's Statements of Certain Facts.

Respondent's statements of certain facts under the headings "Statement" and "Argument" include allegations of fact which, as phrased, are not in accordance with the record or are incomplete and, in either case, are or may be misleading.

(a) *Statement concerning negotiations for disposition of protest proceedings.* Respondent states under the heading "Statement" (Br. 3):

> "During the month of May, 1946, counsel for the petitioners and the Administrator entered into informal *negotiations concerning the disposition of the protest proceedings,* but due to the temporary decontrol of meat during July and August, 1946, no further action was taken *by either party* to the proceedings (R. 19, 24)." (Emphasis ours.)

Although the foregoing statement has no bearing whatsoever on the issue before this Court, respondent apparently seeks to convey the impression, which he argued as a

fact and indication of admitted mootness in his motion to dismiss the complaint (R. 19-20), that petitioners were at some time in the past satisfied to have the protest disposed of otherwise than on the merits and that, during the period of temporary decontrol in July and August, 1946, completely abandoned even such interest in their protest.

These alleged and previously argued facts are wholly unsubstantiated by respondent's references to the record and are wholly untrue. On the contrary, it appears from the record that the "informal negotiations" mentioned by respondent had nothing to do with a disposition of the protest proceeding, but were merely a request by petitioners for interim relief on the basis of the evidence submitted and for permission to submit additional evidence and that the reason why petitioners did nothing in the matter during the temporary decontrol period of July and August, 1946, was that the Administrator promised to consider the said request but never granted the permission requested and never advised petitioners of the decision, if any, which he may have made in the matter and that, as soon as the Administrator without such advice to petitioners ordered the evidential record closed, petitioners filed a formal petition for permission to file the additional evidence (R. 24-25).

(b) *Statement concerning terminated criminal proceedings.* Respondent states under the heading "Argument" (Br. 5):

> "*It was alleged in the complaint that petitioners had an interest in a retroactive determination of the validity of the regulations involved because* of criminal proceedings pending against two of them for violations of the Administrative Code of the City of New York (R. 3). At the time the Administrator filed his motion to dismiss, however, these pro-

ceedings had been terminated (R. 21)." (Emphasis ours.)

The foregoing statement conveys the impression that the complaint in the Emergency Court was based solely upon the pendency of the said criminal proceedings against two of the forty petitioners for alleged violations of one of the three protested regulations; that no other interest on the part of the petitioners in a determination of the validity of the regulations was alleged in the complaint; and that the alleged interest of petitioners and the basis of the complaint came to an end when the said criminal proceedings were terminated.

This is wholly untrue and not in accordance with the record, for the complaint was filed by all forty and not only two of the petitioners and requested a determination of the validity of all three and not only one of the protested regulations and, while it made reference to the said criminal proceedings and the said criminal proceedings were terminated for reasons fully stated in the record (R. 31-32), it was not based solely or even in major part upon the said criminal proceedings, but upon the need of all petitioners to protect their rights in the event of future enforcement proceedings against them, especially criminal proceedings under state or local price control enforcement laws, and upon the same facts and the same grounds and the same provisions of law as mentioned in petitioners' answering brief in opposition to the motion to dismiss the complaint (R. 30-31) and in this petition (Pet. 6-8).

(c) *Statement concerning leave and retention of jurisdiction.* Respondent states under the heading of "Argument" (B. 5), in connection with petitioners' specification that the Emergency Court erred in limiting the leave granted to petitioners and the jurisdiction retained (Pet. 10):

> "The petitioners *made no request* of the court below that any such reservations be made in its judgment, covering liability under either Section 205, a reservation under which was included by the court, *or under the other provisions of law to which they NOW point.*" (Emphasis ours.)

The foregoing statement conveys the impression that petitioners did not raise in the Emergency Court the question of their liability under Section 37 of the Criminal Code (18 U. S. C. A., Sec. 88) or state or local price control enforcement laws and are *now* pointing to said provisions of law for the first time. This is wholly untrue for, as stated above and as appears from the record, the complaint as well as petitioners' answering brief in opposition to the motion to dismiss the complaint were based not only upon Section 205 of the Act but also upon Section 37 of the Criminal Code and especially upon the applicable state and local price control enforcement laws, as is the petition before this Court.

As for petitioners' failure to request "any such reservations", it is respectfully submitted that the "prayer" in the complaint was that the protested regulations be set aside; that under the said "prayer" the Emergency Court had the power to grant such relief short of an immediate determination as would adequately protect the rights of petitioners; and that, if the Emergency Court was correct in its obviously implied holding that petitioners' rights could be equally adequately protected by a preservation of their right to a determination as by an immediate determination, it was incumbent upon said court, to whom all facts were made available, to extend the protection granted to all future enforcement proceedings against petitioners, including future criminal proceedings under Section 37 of the Criminal Code or state or local price control enforcement laws.

III.

Petitioners' Legal Interest and Case.

Respondent argues that petitioners have no legal interest in a determination of the retrospective validity of the protested regulations and that the proceeding seeking such determination is not "a case or controversy" in the constitutional sense, for the alleged reason that no enforcement proceedings are now "actually pending against them" and that they failed to show "that they are in possession of any information" that such enforcement proceedings are about to be brought against them "or that they have any agreements the enforceability of which depends upon the invalidity of the regulations involved"; that the facts in the case at bar differ in such respect from the facts in the *Utah, Collins* and *Thomas* cases cited in the petition; that a determination of validity "*may* have no legal effect" upon petitioners; that their legal interest in such determination is "merely speculative"; that even such interest as petitioners now have will be lessened "daily as the statute of limitations effectively reduces even the possibility of such proceedings"; that a decision holding that the right of judicial review extends to cases such as the case at bar would place an undue burden upon the Emergency Court and "the public officials"; and that, in the absence of any express provision in the Act to such effect, it must be held that it was the intention of the Congress that the right of judicial review should not apply to cases such as the case at bar (Br. 4-8).

That the facts in the case at bar do, in some respects, differ from the facts in the *Utah, Collins* and *Thomas* cases was fully pointed out in petitioners' brief in support of the petition (Pet. 12).

It is respectfully submitted, however, as argued in said brief (Pet. 11-16) and in petitioners' answering brief in opposition to the motion to dismiss the complaint (R. 26-

36), that the clear language of the Act and the construction of the statute adopted and the principles declared by this Court in the case of *Yakus* v. *U. S.*, 321 U. S. 414, *U. S.* v. *Hark, supra,* and in the above mentioned cases which respondent seeks to distinguish are not limited to a state of facts of the kind existing in the latter cases, but apply in equal measure to the facts in the case at bar; that the rights of protest, determination and review granted by Sections 203 (a) and 204 (a) of the Act (50 U. S. C. App. Secs. 923 [a] and 924 [a]) are not conditioned upon an actual pendency or knowledge of actual impendency of enforcement proceedings or the existence of agreements the execution whereof would constitute a violation, but are unqualified and continue as long as the right to enforce and the need to protect the rights of persons "subject to" the regulations and the enforcement thereof (Pet. 12-14; R. 32-35); that the judgment of the Emergency Court, if left undisturbed, not only *may* but *will* actually seriously affect the right of petitioners in the event of any future enforcement proceedings against them, especially future criminal proceedings under state or local price control enforcement laws (Pet. 14-16; R. 36); that the statute of limitations as to criminal proceedings against petitioners will not expire for several years; that Sections 203 (a) and 204 (a) of the Act were enacted by Congress to protect the rights of persons "subject to" price regulations and the enforcement thereof and not for the convenience of "public officials"; and that petitioners' right to a determination of the validity of the protested regulations, or to at least a preservation of such right, cannot be denied as long as the right to institute enforcement proceedings against them continues.

As for petitioners' legal interest and the question of jurisdiction of the cause under Article III, Section 2 of the Constitution and the Declaratory Judgment Act, *45 Stat. 955, Judicial Code 274 (d), 28 U. S. C. 400,* it is respect-

fully submitted that petitioners duly pursued the remedy provided by Congress to protect their rights in the event of future enforcement proceedings against them for alleged violation of the regulations which they claim to be invalid; that their present legal interest in a determination of the validity of the protested regulations is precisely the legal interest contemplated by Congress in providing the remedy pursued; that the proceeding instituted by petitioners to enforce the remedy provided by Congress did not seek "an opinion advising what the law would be on a hypothetical state of facts", but a determination "of a conclusive character" which will seriously affect petitioners' right in the event of future enforcement proceedings against them; that no remedy other than the one pursued by petitioners is available to meet the demands of due process in the event of future criminal proceedings against them under state or local price control enforcement laws; that said proceeding is a "justiciable" and "real and substantial controversy admitting of specific relief" and "an adversary proceeding on facts alleged" wherein the "judicial function may be appropriately exercised"; and that said proceeding is "a case or controversy" within the meaning of Article III, Section 2 of the Constitution as well as "a case of actual controversy" within the meaning of the Declaratory Judgment Act, *Tutan* v. *U. S.*, 270 U. S. 568; *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227; 35 C. J. S. Fed. Courts, Sec. I.

IV.

The Cases Relied on By Respondent.

Respondent's contention that the case at bar is not "a case or controversy" in the constitutional sense is wholly unsupported by the cases cited in his brief.

In the case of *U. S.* v. *Alaska Steamship Co.*, 253 U. S. 113, the order of the Interstate Commerce Commission en-

joined by the District Court involved no question of possible prosecution for past violations and became wholly obsolete with the enactment of the Transportation Act of 1920, which was passed pending the appeal, and, unlike the determination sought in the case at bar, the order of injunction was no longer needed to protect complainants' rights.

In the case of *Willing* v. *Chicago Auditorium Association,* 277 U. S. 274, plaintiffs sought an interpretation of their rights under the leases by which they derived title in order to resolve their doubts as to the correctness of the interpretation favored by them and to make sure that the construction contemplated by them will not subject them to a possible action for damages by the lessor. The latter case is wholly unlike the case at bar in that, among other distinctions, it did not involve the question of validity of a regulation or other law entailing penalties, or a statutory duty to enforce same, or a preclusion of the defense of invalidity in prosecutions for violation thereof, or a need of protecting the right of persons "subject" thereto to due process of law, or a remedy especially provided by Congress to protect such right, or any facts even remotely similar to the facts in the case at bar.

As for the case of *Aetna Life Insurance Co.* v. *Haworth, supra,* in which this Court reversed the decree dismissing the complaint, and the case of *Montgomery Ward & Co.* v. *Bowles,* 147 F. 2d 858, in which the Emergency Court entertained the complaint and made a determination of the validity of the regulation involved, it is respectfully submitted that there is nothing in the principles declared in the said case to support respondent's contention but, on the contrary, that the said principles, even if allowing for the wholly different state of facts in the *Aetna* case and the existence of a preliminary injunction of doubtful remaining effect in the *Montgomery Ward* case, may be well said to fully support petitioners' contention that they

have a "legal interest" in a determination of the retrospective validity of the protested regulations and that the proceeding brought to secure such determination is "a case or controversy" within the meaning of Article III, Section 2 of the Constitution as well as "a case of actual controversy" within the meaning of the Declaratory Judgment Act.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Emergency Court of Appeals should be granted.

Respectfully submitted,

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